

**BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**In the Matter of:**

**KASEY TRUCKING, INC.,  
  
Respondent.**

**Docket No. FMCSA-2008-0200<sup>1</sup>  
(Eastern Service Center)**

**ORDER APPROVING SETTLEMENT AGREEMENT**

On April 4, 2008, the Virginia Division Administrator, Federal Motor Carrier Safety Administration (FMCSA), issued to Respondent, Kasey Trucking, Inc., a Notice of Claim proposing a civil penalty of \$37,980 for eight alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs). Specifically, the Notice of Claim, which was based on a March 6, 2008, compliance review (CR), charged Respondent with: (a) one violation of 49 CFR 382.301(a), with a proposed civil penalty of \$3,780, for using a driver before having received a negative pre-employment controlled substance test result; (b) one violation of 49 CFR 382.303(a), with a proposed civil penalty of \$3,680, for failing to conduct post-accident testing on a driver for alcohol; (c) one violation of 49 CFR 382.303(b), with a proposed civil penalty of \$3,680, for failing to conduct post-accident testing on a driver for controlled substances; (d) one violation of 49 CFR 382.305(b)(2), with a proposed civil penalty of \$3,500, for failing to conduct random controlled substances testing at an annual rate of not less than the applicable annual rate of the average number of driver positions; (e) three violations of 49 CFR 386.83(a)(1)/49 U.S.C. § 31310(i)(2), with a proposed civil penalty of \$7,500 per count, for operating a

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<sup>1</sup> The prior case number of this matter was VA-2008-0140-US1274.

commercial motor vehicle in interstate commerce during a period when the owner had been prohibited from operating for failure to pay a civil penalty; and (f) one violation of 49 CFR 391.51(a), with a proposed civil penalty of \$840, for failing to maintain a driver qualification file on each driver employed.<sup>2</sup>

On April 25, 2008, Respondent replied to the Notice of Claim, contending that the civil penalty was too high. It neither admitted nor denied the violations; it offered to pay \$10,000 in two payments to settle the matter.<sup>3</sup> On June 30, 2008, Claimant, the Field Administrator for FMCSA's Eastern Service Center, moved for a default final order because he contended that Respondent's Reply was deficient. Claimant argued that Respondent: (a) did not acknowledge five of the six alleged violations; (b) did not deny the alleged violation that it did acknowledge; (c) did not include payment or seek administrative adjudication or binding arbitration; and (d) failed to state whether it was choosing to submit written evidence without a hearing, a formal hearing, or an informal hearing.<sup>4</sup> Claimant, however, withdrew two of the three counts pertaining to 49 CFR

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<sup>2</sup> See Exhibit A to "Motion for Default Final Order for Failure to File Adequate Reply in Accordance with 49 C.F.R. § 386.14" (Claimant's Motion for Default Final Order).

<sup>3</sup> See Exhibit B to Claimant's Motion for Default Final Order.

<sup>4</sup> Respondent's Reply would not have constituted a default. Claimant correctly stated that Respondent's silence as to the allegations amounted to admissions (*See In the Matter of Executive Express Trucking, Inc.*, Docket No. FHWA-97-2499, Final Order, September 14, 1999, at 3, citing *In the Matter of Lakeview Farms, Inc.*, Docket No. R3-91-157, Final Order, February 8, 1993); therefore, the only dispute was the amount of the civil penalty and the time in which to pay it, which is the purpose of the Agency's binding arbitration program. Claimant could have accepted the Reply as a request for binding arbitration, even though Respondent did not use those words, instead of submitting a Motion for Default Final Order. Respondent's statement that the civil penalty of \$22,980 was too high and its offer to settle the matter for \$10,000 in two payments meant that it did not wish to pay \$22,980 in one payment. "Claimant may not interpret the requirements for a reply so narrowly as to seek the declaration of a default when Respondent has clearly participated in the proceedings." *See In the Matter of*

386.83(a)(1)/49 U.S.C. § 31310(i)(2), thereby reducing the proposed civil penalty to \$22,980.<sup>5</sup>

On November 6, 2008, Claimant submitted a Notification of Settlement and Motion to Close Docket, stating that all pending issues had been resolved; he requested, therefore, that the proceeding be dismissed and the docket be closed. Under the Settlement Agreement, which was executed by Respondent on October 24, 2008, and by Claimant on November 3, 2008, and adopted as a Final Order,<sup>6</sup> Respondent agreed to pay the negotiated amount of \$22,980<sup>7</sup> in 20 monthly payments beginning October 30, 2008.<sup>8</sup> The parties agreed that execution of the Settlement Agreement constituted an admission of the violations set forth in the Agreement,<sup>9</sup> which were the same violations alleged in the Notice of Claim, minus the two counts that were subsequently withdrawn. With the exception of those portions of the Settlement Agreement that have been voided,<sup>10</sup> it is in the public interest.

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*Thomas E. McGonigle*, Docket No. FMCSA-2008-0072, Order Denying Motion for Default and Requiring Claimant to Submit Evidence, June 27, 2008, at 3.

<sup>5</sup> It is not clear from the record how Respondent knew on the date of its Reply, April 25, 2008, that the proposed civil penalty had been reduced to \$22,980 when Claimant did not revise the amount until June 30, 2008, in his Motion for Default Final Order.

<sup>6</sup> See Settlement Agreement, paragraph 8; 49 CFR 386.22(a)(1)(vii).

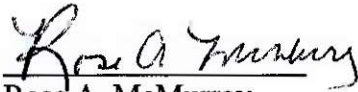
<sup>7</sup> Paragraph 5 of the Settlement Agreement states in bold print: **"This Agreement removes two counts of 49 CFR 386.83(a)(1)/49 USC 31310(i)(2), from the Notice of Claim, reducing the total amount claimed to \$22,980.00"** This is not true. The Settlement Agreement was not signed by the Field Administrator until November 3, 2008; yet he had already withdrawn those counts in his Motion for Default Final Order on June 30, 2008. Moreover, Respondent referred to a \$22,980 civil penalty in his April 25, 2008, Reply. Accordingly, we are voiding the first sentence of paragraph 5.

<sup>8</sup> See Settlement Agreement, paragraph 6, for the monthly payment amounts and their due dates.

<sup>9</sup> See Settlement Agreement, paragraph 3. We note that there is no paragraph 4 to the Settlement Agreement.

<sup>10</sup> The second and third sentences of paragraph 8 are also void. *See In the Matter of Golden Eagle Transit, Inc.*, Docket No. FMCSA-2009-0044, Final Agency Order: Order on Reconsideration, July 10, 2009, at 7.

Accordingly, *It Is Hereby Ordered That* Claimant's request is granted, the Settlement Agreement, as amended by this Order, is the Final Order in this proceeding, the proceeding is dismissed, and the docket is closed.



Rose A. McMurray  
Assistant Administrator  
Federal Motor Carrier Safety Administration

11-5-09  
Date

**CERTIFICATE OF SERVICE**

This is to certify that on this 6 day of November, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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